11-1-2012

Tenth Place: The State of Florida v. Joelis Jardines

David Chang

Lauren Wilner

No. 11-564

IN THE

SUPREME COURT OF THE UNITED STATES

FALL TERM 2012

STATE OF FLORIDA,
Petitioner,

v.

JOELIS JARDINES,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT

Round 1, 6:00 p.m.
November 1, 2012

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QUESTIONS PRESENTED

1. Is a drug-detection dog "sniff test" a search under the Fourth Amendment when it is conducted at the front door of an individual's home, exposes intimate details about the home's interior, and gives the Government the functional equivalent of presence within the home, thereby violating an individual's reasonable expectation of privacy?

2. Is a drug-detection dog-sniff search that intrudes upon the home's heightened Fourth Amendment protection an invasive search technique that requires a prior evidentiary showing of probable cause, not reasonable suspicion?

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OPINION BELOW

The opinion of the Supreme Court of Florida is reported at Jardines v. State, 73 So. 3d 34 (Fla. 2011).

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STANDARD OF REVIEW

Because the issue of whether a dog sniff at the front door of a home constitutes a search under the Fourth Amendment is a question of law, it must be reviewed *de novo*. Ornealas v. United States, 517 U.S. 690, 698-99 (1996). Further, determination of the proper evidentiary standard for a dog-sniff search is a question of law, which also is reviewed *de novo*. Id. at 699.

STATEMENT OF THE CASE

Statement of Facts

On November 3, 2006, Detective William Pedraja received an anonymous tip from the crime stopper's hotline that Joelis Jardines was growing marijuana in his house. (J.A. 8.) The anonymous caller was not a qualified confidential informant nor was the unknown individual's tip verified. (J.A. 135.) More than a month passed before Pedraja began surveilling Jardines's private residence. (J.A. 8.)

When Pedraja began his surveillance of Jardines's home, the blinds of the home were drawn. (J.A. 9.) No vehicles were in the driveway. (J.A. 9.) There was no evidence that Pedraja's surveillance of Jardines's private residence corroborated the anonymous crime stopper's tip. (J.A. 135.)

After watching Jardines's home for a mere fifteen minutes, Pedraja entered Jardines's property and approached Jardines's front porch. (J.A. 32.) Outside Jardines's home, multiple police vehicles and law enforcement personnel gathered with narcotics detectives, other officers, and law enforcement personnel from various governmental departments, both state and federal. Jardines v. State, 73 So. 3d 34, 48 (Fla. 2011). Detective Douglas Bartelt, an experienced dog handler, and Bartelt's trained drug-detection dog "Franky" accompanied Pedraja to the front porch of Jardines's home. (J.A. 32.)

Franky was trained specially for the purpose of detecting the presence of contraband. (J.A. 9.) Franky provided the Government with enhanced sensory capabilities that allowed the Government to detect contraband under circumstances in which humans otherwise could not. (J.A. 72.)

Pedraja, Bartelt, and Franky stopped at an archway approximately six to eight feet away from the front door. (J.A. 45.) Standing behind the dog, Bartelt extended Franky's leash the full distance to the front door of Jardines's house. (J.A. 35.) Franky alerted positively to the presence of narcotics. (J.A. 36.)

In the warrant affidavit and during various hearings, Pedraja claimed to smell live marijuana at the front door of Jardines's home. (J.A. 36.) Pedraja observed the air conditioning unit running continuously. (J.A. 16.) Pedraja's recollection, however, conflicts with Bartelt's; Bartelt did not smell marijuana. (J.A. 16.) Instead, Bartelt reported only the strong scent of mothballs. (J.A. 55.)

After the dog-sniff search, Bartelt returned to his vehicle with Franky, provided Pedraja with affidavit information, and left the premises. (J.A. 54.) Pedraja drove to a nearby location and prepared a search warrant. (J.A. 38.) Relying upon Franky's positive alert and his claim that he smelled marijuana, Pedraja obtained a search warrant. (J.A. 17.) The entire procedure lasted for hours and was in plain public view. Jardines, 73 So. 3d at 48.

Approximately one hour after receiving the warrant, members of the Miami-Dade Police Department entered Jardines's home. (J.A. 17.) They conducted a search and found marijuana. (J.A. 19.) Jardines moved to suppress the evidence found in the search, claiming that the search violated his Fourth Amendment right to be free from unreasonable searches and seizures. (J.A. 17.)

Preliminary Statement

The State of Florida charged Joelis Jardines with Trafficking Cannabis, a felony in the first degree, and Grant Theft of the third degree. (J.A. 17.)

Prior to trial, Jardines filed a motion to suppress the physical evidence law enforcement gathered at his home. (J.A. 16.) The Circuit Court for Miami-Dade County granted Jardines's motion to suppress. (J.A. 134.) The State appealed the suppression ruling. Jardines v. State, 73 So. 3d 34, 35 (2011).

The Florida District Court of Appeal reversed. Id. Jardines appealed to the Florida Supreme Court. Id.

The Florida Supreme Court quashed the District Court of Appeal decision and granted Jardines's motion to suppress. Id. The State filed a petition for writ of certiorari on October 26, 2011. (J.A. 1.) This Court granted that petition on January 6, 2012. (J.A. 1.)

SUMMARY OF ARGUMENT

The Fourth Amendment's protection of the home is as old as the common law itself. As such, an individual's expectation of privacy is most heightened in his or her residence. When law enforcement uses sense-enhancing devices to obtain information about the interior of the home that otherwise would remain unknowable without physical intrusion, such use gives law enforcement the functional equivalent of presence inside the home. A drug-detection dog's nose is such a device. Additionally, the front door of a private residence is within the curtilage of an individual's home and is afforded heighted protection under the Fourth Amendment. Thus, a dog-sniff search conducted within the curtilage of an individual's home intrudes upon the sanctity of the home. Therefore, this intrusion gives law enforcement the equivalent of physical

presence inside the home, reveals intimate details about the home's interior, and constitutes a search under the Fourth Amendment.

Moreover, before conducting a dog-sniff search, the Government must make a prior evidentiary showing of probable cause, not reasonable suspicion. Because an individual's expectation of privacy is most heightened in the home, probable cause is the presumptive legal standard for searches of the home. The presumptive standard must be applied when a dog-sniff search reveals information about the interior of the home.

The evidentiary standard applied in this Court's prior dog-sniff cases is inapplicable here because public places such as highways and airports have not been afforded the home's heightened Fourth Amendment protection. Because dog-sniff searches have proven unreliable, a higher evidentiary standard must be required to protect an individual's expectation of privacy in the home. Therefore, prior to conducting a dog-sniff search of a home, the Government must make a showing of probable cause because permitting searches based on mere reasonable suspicion will not sufficiently protect an individual's privacy rights in the home.

ARGUMENT

The Government's use of a drug-detection dog to perform a "sniff test" at the front door of a private residence constitutes a search under the Fourth Amendment that requires a prior showing of probable cause. The Fourth Amendment states "the right of the people to be secure in their persons, houses, papers, and effects . . . shall not be violated . . . ." U.S. Const. amend. IV. Although physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed, the spirit of the Amendment has been interpreted as protecting much more than physical intrusions. United States v. Dist. Ct., 407 U.S. 297, 313 (1972).

Katz v. United States established a two-part inquiry into whether a Fourth Amendment "search" has occurred in a given circumstance. 389 U.S. 347, 361 (1967). First, a person must have exhibited an actual (subjective) expectation of privacy. Id. Second, the expectation must be one that society is prepared to recognize as "reasonable." Id. Wherever a person has a reasonable expectation of privacy, he or she is entitled to be free from unreasonable governmental intrusion. Id. at 351. The Fourth Amendment protects a variety of places, but in none is the area of privacy more clearly defined than in the home where privacy expectations are highest. Dow Chem. Co. v. United States, 476 U.S. 227, 250 (1986).

In Kyllo v. United States, this Court held that using sense-enhancing technology to obtain information about the interior of a home that could not otherwise be obtained without physical intrusion constitutes a search. 533 U.S. 27, 34 (2001). Because a dog-sniff search provides law enforcement with access that is the functional equivalent of physical presence inside of the home, a dog's nose functions like a sense-enhancing device. Without a prior showing of probable cause, the Government's practice of using a dog-sniff search at the front door of private homes constitutes a search under the Fourth Amendment.

I. A DOG-SNIFF SEARCH AT THE FRONT DOOR OF A PRIVATE RESIDENCE IS A "SEARCH" WITHIN THE MEANING OF THE FOURTH AMENDMENT BECAUSE IT REVEALS INTIMATE DETAILS ABOUT THE INTERIOR OF THE HOME.

The Fourth Amendment embodies the centuries-old principle of respect for the privacy of the home. Wilson v. Layne, 526 U.S. 603, 604 (1999). "At the very core" of the Fourth Amendment, "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Silverman v. United States, 365 U.S. 505, 511 (1961). The Fourth Amendment's protection of the home has never been tied to the measurement of the quality or quantity of information obtained. Kyllo, 533 U.S. at 37. Any physical invasion of the

structure of the home, "by even a fraction of an inch," is too much. Silverman, 365 U.S. at 512. The heightened privacy interest afforded to the home even extends to the area immediately attached to and surrounding it, known as the curtilage. United States v. Dunn, 480 U.S. 294, 300 (1987). There is a ready criterion "with roots deep in the common law" of the minimum expectation of privacy that exists inside the home, which the Government cannot undercut, and that is acknowledged to be reasonable. Kyllo, 533 U.S. at 34. Diminishing this minimum, reasonable expectation would permit police investigative devices to erode the realm of guaranteed privacy the Fourth Amendment protects and would signal a return to the era of general warrants the Amendment was intended to prohibit.

A. When a Sense-Enhancing Device Gives the Government Access that Is the Functional Equivalent of Physical Presence in an Individual's Home, Use of that Device at a Home Must Constitute a Search.

The Framers intended the Fourth Amendment to protect the home from prying Government eyes. Id. at 33. A dog-sniff search at the front door of a private residence, the single most protected area under the Fourth Amendment, violates an individual's reasonable expectation of privacy in his or her home because it exposes information about the interior of the home that otherwise would be unknowable without physical intrusion. Because this Court has said, "inside the home, all details are intimate details," which are afforded Fourth Amendment protection, a dog-sniff search that reveals such information must constitute a search. Id. at 34.

1. A drug-detection dog's nose functions like a sense-enhancing device that reveals intimate details about the inside of an individual's home.

The Fourth Amendment draws a "firm line" at the entrance to the home. Payton v. New York, 455 U.S. 573, 590 (1980). Drug-detection dogs are trained specially, their senses adapted and conditioned exclusively for the purpose of detecting contraband in circumstances in which humans cannot. Thus, a drug-detection dog's nose functions like a sense-enhancing device

because it crosses the "firm line" at the entrance to the home to expose information that otherwise would be unknowable to law enforcement. When officers use dog-sniff searches to obtain information about the inside of a home, such use of that investigative device must constitute a search. Kyllo, 533 U.S. at 33.

In Kyllo, law enforcement officers used a thermal-imaging device to scan a private home to determine if the amount of heat the home generated was consistent with the use of high-intensity lamps used for growing marijuana. Id. at 29-30. This Court held that when the Government uses a sense-enhancing device that is not in general public use, to explore details of a home that otherwise would be unknowable without physical intrusion, the investigative technique constitutes a search. Id. at 27.

In Kyllo, this Court concluded that the thermal imager was capable of detecting more than the mere heat radiating from the home's external surface. Id. at 28. Because the thermal imager could detect heat, "it might disclose at what hour each night the lady of the house takes her daily sauna and bath." Id. at 38. Although such information is not particularly private or important, this Court stated: "there is no basis for concluding it is not information regarding the interior of the home." Id. at 34-35 n.2. In fact, a detail becomes "intimate" merely by virtue of being a detail about the home. Id. at 38. Like the sense-enhancing device in Kyllo, a dog-sniff search exposes information to the Government about the private contents of the home, that is, the "intimate details" of the home that this Court condemned in Kyllo. Additionally, because drug-detection dogs are fallible, see infra, at 10, dog-sniff searches might disclose lawful activity. Therefore, because a drug detection dog's nose can detect contraband in circumstances where a human cannot, it is a sense-enhancing device that, when used upon a house, must constitute a search.

Moreover, it is irrelevant whether passersby might have smelled the odor emanating from within Jardines's home without the use of a drug-detection dog because "the fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment." Kyllo, 533 U.S. at 34-35 n.2. Here, law enforcement did not detect the odor without the dog's assistance. The dog's alert to marijuana occurred prior to Pedraja's detection of its odor, and it cannot be presumed that he detected the smell of marijuana before the dog alerted. This is particularly true in light of Detective Bartelt's testimony that he did not smell the scent of marijuana at all. Because law enforcement used a sense-enhancing device to obtain information otherwise unknowable, the dog-sniff search at Jardines's front door constituted a search.

2. Because drug-detection dogs are fallible, a dog-sniff search can reveal more about the interior of a home than the mere presence or absence of narcotics.

Similar to the thermal imager in Kyllo, a dog-sniff search is capable of detecting more than the mere presence or absence of narcotics in the home. At the heart of the Government's argument is the proposition that a dog-sniff search is *sui generis* because the dog only alerts to the presence or absence of narcotics. United States v. Place, 462 U.S. 696, 707 (1983). In Place, this classification was based on the limited nature of the intrusion in addition to the assumption that trained drug-detection dogs do not err. Id. However, a dog-sniff search can no longer claim the certainty that Place assumed, both in treating the deliberate use of sniffing dogs as *sui generis* and in taking that characterization as a reason to argue that dog sniffs are not searches subject to Fourth Amendment scrutiny. Illinois v. Caballes, 543 U.S. 405, 413 (2005) (Souter, J., dissenting).

Due to handler errors, limitations of the dogs themselves, and even the pervasiveness of money contaminated with drugs, these drug-detection dogs are fallible. Caballes, 543 U.S. at 411-12 (Souter, J., dissenting); see, e.g., United States v. Kennedy, 131 F.3d 1371, 1378 (10th Cir. 1997) (describing a dog that had a twenty-nine percent inaccuracy rate); United States v. Limares, 269 F.3d 794, 797 (7th Cir. 2001) (accepting as reliable a dog that gave false positives between seven percent and thirty-eight percent of the time); United States v. $242,484.00, 351 F.3d 499, 511 (11th Cir. 2003) (noting that because as much as eighty percent of all currency in circulation contains drug residue, a dog alert "is of little value"). In fact, dogs in artificial testing situations have returned false positives as much as sixty percent of the time, depending on the length of the search. Caballes, 543 U.S. at 412. Thus, the reality that these dogs are, in fact, fallible, adds urgency to the request that this Court not strictly adhere to its reasoning in Place, especially when the dog-sniff search occurs in a protected area like the home.

Because the weight of Place's reasoning is inapposite, here, this Court should focus on the actual purpose of the dog-sniff search, which is "to obtain information about the contents of private spaces beyond anything that human senses could perceive, even when conventionally enhanced." Id. at 413. In practice, the Government's use of dog-sniff searches functions as a search to reveal undisclosed facts about private areas that will later be used to justify a further and complete search of the enclosed area. Therefore, given the fallibility of the dog, the sniff is the first step in a process that might disclose "intimate details" without revealing contraband.

3. A dog-sniff search at the front door of a private residence violates an individual's reasonable expectation of privacy in his or her home.

In the home, privacy expectations are at their highest. Dow Chem. Co., 476 U.S. at 250. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection, but "what he seeks to preserve as private, even in an area

accessible to the public, may be constitutionally protected." Katz, 389 U.S. at 351. A dog-sniff search at the front door of a private residence violates an individual's reasonable expectation of privacy in his or her home because it exposes to the Government what an individual has sought to make private.

For example, in Katz, this Court distinguished between the "uninvited ear," which was the electronic bugging device, and "intruding eyes." Id. Because the telephone booth in which Katz was standing was made of glass, his physical actions were knowingly exposed to the public, but "what he sought to exclude when he entered the telephone booth was the uninvited ear." Id. at 352. In shutting the booth's door and paying the toll, Katz was "surely entitled to assume that the words he utter[ed] . . . [would] not be broadcast to the world." Id. at 352-53. As a result, "the Government's activities . . . violated the privacy upon which he justifiably relied." Id. at 353.

Similarly, the dog-sniff search violated Jardines's reasonable expectation of privacy because it allowed the Government to "see" through the opaque walls of a protected area. By shutting his front door and drawing the blinds, Jardines sought to make the contents of his home entirely private from "prying Government eyes." Kyllo, 533 U.S. at 37. Just as Katz was entitled to assume that the words he uttered would not be broadcast to the world, Jardines was also entitled to assume that the concealed contents of his home would not be revealed to the Government.

When the circumstances have involved a home, this Court has been especially vehement in its protection of an individual's expectation of privacy. For example, in United States v. Karo, this Court held that the Government's electronic monitoring of a beeper became a search once one of the defendants carried the beeper into a residence. 468 U.S. 705, 714 (1984). In contrast,

this Court held in United States v. Knotts that because police had not used an electronic beeper to track the defendant's activities within his home, use of the beeper to track the defendant's movement was not a search. 460 U.S. 276, 277 (1983). There, this Court concluded specifically that the police had not used the beeper to track the defendant's activities within his home, so that the "traditional expectation of privacy within a dwelling place" remained undisturbed. Id. at 276. Here, Jardines's expectation of privacy was even greater than Katz's because the object of the search was within a private, protected area, not within a public space, such as the telephone booth in Katz. Therefore, because the dog-sniff search exposed information about the interior of the home, the Government violated the reasonable privacy expectation upon which Jardines justifiably relied.

Furthermore, it is inconsequential that a dog-sniff search allegedly provides limited information regarding only the presence or absence of narcotics because the Fourth Amendment's reach "has never been tied to the measure of the quality or the quantity of the information obtained." Kyllo, 533 U.S. at 37. For example, in Karo, the only object the Government detected was a can of ether in the home. 468 U.S. at 708. Notwithstanding the limited amount of information revealed, this Court held that the Government's use of a beeper to monitor a person or object's presence inside an individual's home constitutes a search. Id. Similarly, in Arizona v. Hicks, the only item law enforcement detected was the registration number of a phonograph turntable. 480 U.S. 321, 321 (1986). Again, despite the seemingly innocuous information revealed, this Court held that when an officer moves various pieces of stereo equipment to record the registration numbers, his conduct also constitutes a search. Id. Finally, in Kyllo, the Government only detected the relative warmth of Kyllo's residence. 533 U.S. at 38. Nonetheless, this Court still held that the Government's use of a thermal imager on

an individual's residence constitutes a search. Kyllo, 533 U.S. at 38. Therefore, the limited nature of the information revealed has not been a dispositive factor in this Court's analysis of whether a search has occurred.

When a sense-enhancing device pierces the threshold of the home, exposing information about its interior, this Court has consistently held that use of such a device violates an individual's expectation of privacy in his or her home and constitutes a search. However, not all uses of sense-enhancing devices constitute a search. For example, in United States v. Lee, this Court found that the use of a flashlight or searchlight to observe in the dark what would be visible to the naked eye in the light does not constitute a search. 274 U.S. 559, 563 (1927); see also Texas v. Brown, 470 U.S. 730, 740 (1983) (concluding that the use of artificial means to illuminate a darkened area "simply does not constitute a search, and thus triggers no Fourth Amendment protection."). Similarly, in On Lee v. United States, this Court stated in dicta that the use of bifocals, field glasses, or a telescope to magnify the object of a witness' vision also does not constitute a search. 343 U.S. 747, 754 (1952).

Unlike a searchlight or field glass, however, a drug-detection dog's sniff enhances the officer's sense of smell in a different way than a flashlight enhances the officer's sight. Those devices function like an extension of the officer's own human perceptive capabilities, allowing him to better view that which is already "knowingly exposed to the public." Katz, 533 U.S. at 352. Although a drug-detection dog's nose functions like a sense-enhancing device in that the dogs are trained specially to smell contraband in circumstances in which humans cannot, the dog-sniff search is an investigative device distinct from a flashlight, searchlight, or field glass. A flashlight or binoculars improve the officer's natural, human ability to see, whereas a dog's sniff does not improve the officer's own sense of smell. Rather, the dog-sniff search pierces the

opaque walls of the home, exposes to the officer private details about the inside of the home, and ultimately gives law enforcement access that is the functional equivalent of physical presence within the home. Therefore, a dog-sniff search is a sense-enhancing device that, when used upon a home, violates an individual's reasonable expectation of privacy in his or her home and constitutes a search.

Finally, when determining whether a reasonable expectation of privacy has been violated, this Court has generally looked to the context in which an item was made private, not exclusively to the identity of the concealed item. United States v. Jacobsen, 466 U.S. 109, 140 (1984) (Brennan, J., dissenting). The Government may argue that an individual has no reasonable expectation of privacy in possessing contraband and because a dog-sniff search only reveals the presence or absence of contraband, the dog-sniff search does not violate any legitimate expectation of privacy. However, this Court stated in Kyllo that a detail becomes "intimate" merely by virtue of being a detail about the home. 533 U.S. at 38. Inside the home, "all details are intimate details" entitled to the Fourth Amendment's protection. Id. at 33. Thus, when the target of a search is located within a protected area, it is an "intimate detail" and afforded Fourth Amendment protection. Id.

Furthermore, blanket permission to use dog-sniff searches at private residences would grant law enforcement officers free rein in utilizing a potentially broad range of surveillance techniques merely because they only reveal whether or not contraband is present in a particular location. Jacobsen, 466 U.S. at 140. Doing so would leave no room to consider whether the surveillance technique is employed randomly or selectively. Id. Therefore, this Court should, again, focus on the historical protection afforded to the home and find that a dog-sniff search of a home constitutes a search.

In Katz, it was of "no constitutional significance" that the electronic device did not penetrate the wall of the telephone booth. 389 U.S. at 354. Rather, this Court focused on the private context in which the conversation took place, seizing upon the difference between "intruding eyes" and the "uninvited ear." Id. at 352. Here, the dog-sniff search revealed information about the interior of Jardines's home that he sought to make private. Because the dog-sniff search exposed information about a protected area, it was substantially more invasive of his reasonable expectation of privacy than was the case in Katz, where the Government invaded a public space but this Court still found that the Government's activities constituted a search. Here, this Court must continue to protect the sanctity of the home. Moreover, because drug-detection dogs are not widely available for public use, the search of a home using such a device is substantially more invasive; "a search in violation of the Constitution is not made lawful by what it brings to light." Jacobsen, 466 U.S. at 140 (citing Bryars v. United States, 273 U.S. 28, 29 (1927)). Therefore, this Court should focus on the context in which Jardines made the contents of his home private because the home historically has been afforded the highest Fourth Amendment protection.

B. The Government Was Not Lawfully Present when It Conducted the Dog-Sniff Search at the Front Door of Jardines's Private Residence Because a Front Door Is Within the Curtilage of a Home.

It is well-settled that the Fourth Amendment provides significant protections to the home, but that protection also extends to the areas immediately attached to and surrounding the home, known as the curtilage. Dunn, 480 U.S. at 300. The protection afforded the curtilage is essentially a "protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." California v. Ciraolo, 476 U.S. 207, 212 (1986). When the Government conducted the dog-sniff

search at the front door of Jardines's home, the Government was within the curtilage of Jardines's private residence where Jardines was entitled to heightened Fourth Amendment protection.

1. The front door of an individual's home is so intimately tied to the home itself and to the privacies of life, that it falls within the curtilage and is entitled to protection under the Fourth Amendment.

The front door of an individual's home is so intimately tied to the home itself that it must be entitled to the Fourth Amendment's protection. In Dunn, this Court articulated four relevant factors to determine whether an area falls within the curtilage of a home: (1) proximity of the area to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken to protect the area from observations of passersby. 480 U.S. at 301. These factors are useful in establishing whether the area in question harbors the "intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" Oliver v. United States, 466 U.S. 170, 180 (1984) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

Courts have considered within the curtilage areas surrounding the home that bear a much lesser degree of intimacy with the home than a front door does. Accordingly, these courts have afforded such areas Fourth Amendment protection. For example, in United States v. Jenkins, the court found that a backyard with a "neatly mowed lawn and garden arrangement" is "clearly demarked as a continuation of the home itself." 124 F.3d 768, 773 (6th Cir. 1997). In United States v. Van Dyke, the court held that even a flower patch bordering a mowed lawn 150 feet from the house was not per se outside the protected curtilage. 643 F.2d 992, 993 (4th Cir. 1981). If a mowed lawn was "clearly demarked as a continuation of the home," then a structural element of the physical house itself must be a continuation of the home, if not considered a part

of the home itself. Moreover, in United States v. Charles, the doorknob on the front door of the suspect's home was held to be within the curtilage of his home because it was "an area around the home to which the activity of home life extends." 290 F. Supp. 2d 610, 611 (D.V.I. 1999).

Because the front door is the primary entryway into the intimate activity of an individual's home and the privacies of his or her life, Jardines had a reasonable expectation of privacy in the area immediately surrounding his front door. Therefore, when the Government conducted the dog-sniff search at the front door of Jardines's home, it was within the curtilage of Jardines's home and, thus, the Government's conduct constituted a search.

2. Jardines had a reasonable expectation of privacy in his front porch.

There is a crucial difference between the public's presence in an area that is publicly accessible, and the Government conducting an investigation that exposes information about the interior of the home from a vantage point in that same area. The Government may argue that an individual does not harbor an expectation of privacy on a front porch "where deliverymen and others are free to observe the plants thereon." State v. Detlefson, 335 So. 2d 371, 372 (Fla. Dist. Ct. App. 1976); see also State v. Morsman, 394 So. 2d 408 (Fla. 1981) (holding that under Florida law individuals do not harbor an expectation of privacy on a front porch where salesmen or visitors may appear at anytime). The Government may rely upon Katz where this Court held that a person has no legitimate expectation of privacy in that which he or she "knowingly exposes to the public." 389 U.S. at 351. Indeed, as this Court observed in Ciraolo, "the Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." 476 U.S. at 213.

Unlike a deliveryman who might appear at any time to visually observe the plants on an individual's porch or a police officer who is not required to shield his eyes from a home, a dog-

sniff search on the front porch does not require the dog to perceive anything visually. Here, the information being acquired is not in plain view. Rather, through the dog's enhanced sensing capabilities, the dog's sense of smell penetrates the walls of the home to expose to the Government what an individual has made private from the rest of the world. Because an individual has a reasonable expectation of privacy in the "intimate details" of his or her home, which extends to the curtilage, Jardines had a reasonable expectation of privacy on his front porch. Kyllo, 533 U.S. at 33.

Finally, the "public smell doctrine" is not applicable when the Government conducts a search where it is not lawfully permitted to be present. The "public smell doctrine," analogous to the "plain view" doctrine, holds that an individual does not have a reasonable expectation of privacy in any odors that law enforcement agents or trained canines can detect while they are in a position in which they have a right to be. Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 477 (5th Cir. 1982). However, the "public smell doctrine" is not applicable when officers and their drug detection dogs conduct a search where they are not lawfully permitted to be. United States v. Tarazon-Silva, 960 F. Supp. 2d 1152, 1162 (W.D. Tex. 1997). Here, not only did law enforcement conduct a search within the curtilage of Jardines's home, but the Government also used a sense-enhancing device that provided it with the functional equivalent of physical presence inside the home, where the Government did not have a right to be present. Therefore, the "public smell doctrine" does not apply here.

C. This Court's Prior Dog Sniff Cases Are Inapplicable Here Because a Dog-Sniff Search of a Home Is Qualitatively Different than a Similar Search of Other Non-Protected Areas.

A dog-sniff search at a private residence is qualitatively different than a "sniff test" of luggage at an airport, of a car's exterior at a lawful traffic stop, or of a car's exterior at a drug

interdiction checkpoint. An airport and a highway are unquestionably public places where an individual has little expectation of privacy, whereas a home is undoubtedly a private place characterized by its very privacy and must be treated differently. State v. Rabb, 920 So. 2d 1175, 1186 (Fla. Dist Ct. App. 2006). As a result, this Court's prior dog-sniff cases are inapplicable to a dog-sniff search of a home.

A variety of cases demonstrate this distinction. First, in Place, police temporarily seized a piece of luggage at an airport based on reasonable suspicion and subjected the luggage to a drug-detection dog "sniff test." 462 U.S. at 696. This Court held that the "sniff test" was not a search under the Fourth Amendment because it was a minimally intrusive procedure that only revealed the presence or absence of narcotics. Id. at 707.

However, this Court held only that "the particular course of investigation that the agents intended to pursue – exposure of Respondent's luggage, which was located in a public place, to a trained canine – did not constitute a search within the meaning of the Fourth Amendment." Id. at 705-06. Nothing in this Court's analysis indicates that the same reasoning applies to a dog-sniff search of an individual's home. Furthermore, various state courts have rejected the reasoning in Place when the circumstances involved a dog-sniff search of a private enclave. See McGahan v. State, 807 P.2d 506 (Alaska Ct. App. 1991) (holding that a dog-sniff search of the exterior of a commercial building is a search requiring reasonable suspicion); State v. Ortiz, 600 N.W.2d 805 (Neb. 1999) (holding that a dog-sniff search of an apartment residence from the hallway is a search); People v. Dunn, 564 N.E.2d 1054 (N.Y. 1990) (holding that a dog-sniff search of an apartment residence from the hallway is a search); Commonwealth v. Johnston, 530 A.2d 74 (Pa. 1987) (holding that a dog-sniff search of a store is a search); State v. Dearman, 962 P.2d 850

(Wash. 1998) (holding that the use of a trained narcotics dog to detect marijuana growing in the Defendant's garage constitutes a search).

Relying on Place, this Court also held in Edmond that a "sniff test" of a car's exterior while stopped at a dragnet-style drug checkpoint is not a search when it does not require entry into the car nor is designed to disclose any information other than the presence or absence of narcotics. Edmond, 531 U.S. at 40. However, under this Court's precedent, cars and the containers found therein are not afforded the same privacy interests as the home. California v. Carney, 471 U.S. 386, 390-91 (1985).

Finally, in Caballes, law enforcement conducted a "sniff test" of a car's exterior when Caballes was lawfully stopped for speeding. 543 U.S. at 406. There, again relying on Place, this Court held that the "sniff test" was not a search because it only revealed the presence or absence of narcotics, which did not compromise a legitimate privacy interest. Id. at 408-09.

Unlike the home, the "sniff tests" in the preceding cases were all conducted upon objects that do not warrant special Fourth Amendment protection and in public places where individuals have reduced expectations of privacy. Furthermore, as the court below correctly noted, the dog-sniff search subjected Jardines to a range of concerning circumstances that were not present in this Court's prior dog-sniff cases. Because the search was conducted in a residential neighborhood in plain public view, Jardines did not retain any degree of anonymity and he was subjected to public opprobrium, humiliation, and embarrassment. Furthermore, there was no risk in the preceding cases that the "sniff tests" were administered in a discriminatory or arbitrary manner, whereas here there is a significant risk that granting the Government blanket permission to conduct dog-sniff searches of a home without a prior showing of probable cause could be administered in a discriminatory or arbitrary manner. The luggage in Place was seized based on

reasonable suspicion, the car in Edmond was seized in a dragnet-style stop, and the car in Caballes was seized pursuant to a lawful traffic stop; all were unlike the search of Jardines's home.

Here, allowing the Government to conduct dog-sniff searches of private residences without a prior showing of probable cause will create a rule that will permit far more warrantless searches. The Government would be permitted to approach the front doors of every house on a street and conduct a sniff search in the hopes that the dog will find drugs inside. Rabb, 920 So. 2d at 1190-91. In such a case, if drugs are detected, then no search will have occurred because there is no legitimate expectation of privacy in possessing drugs and the Fourth Amendment is therefore not implicated. Id. Yet, if drugs are not detected, then law enforcement cannot charge the individual with a crime and the unfounded search goes undeterred. Id. An ends-justifies-the-means approach to the Fourth Amendment is simply not what the Founders intended when they drew a "firm line" at the entrance to the home. Payton, 455 U.S. at 590.

D. A Dog-Sniff Search, Unlike a Pen Register or Computer Surveillance, Does Not Involve a Reciprocal Relationship Where the Technology Benefits the Government and the Public.

Unlike prior Fourth Amendment cases involving technology, the use of a dog-sniff search allows the Government to peer into an individual's life without any reciprocal benefit to the public. This Court has held that the Government's use of certain investigative techniques, such as pen registers or computer surveillance, did not constitute a search. In those cases, the government and the public both benefitted from use of the technology. Because a dog-sniff search gives the Government private information without any reciprocal benefit to the public, this Court must protect the home from the invasiveness of such a search technique.

In Smith v. Maryland, this Court held that there is no search when the Government requests that a telephone company use a pen register to record telephone numbers dialed from a private residence. 442 U.S. 735, 745-46 (1979) (reasoning that telephone users know that they convey the numbers they are dialing to the telephone company, and they know that the phone company has the capacity to record this information, because customers see a list of toll calls on their monthly bills).

Similarly, in United States v. Forrester, the Government used computer surveillance to learn the to/from addresses of Forrester's email messages, the Internet protocol ("IP") addresses of the websites he visited, and the total volume of information transmitted to or from his account. 512 F.3d 500, 504 (9th Cir. 2007) (holding that because this type of surveillance was analogous to the use of a pen register in Smith, it did not constitute a search).

In the preceding cases, the Government benefitted from the technology because it enabled the Government to learn the phone numbers dialed and the websites visited. Similarly, the public benefitted from the use of such technology because members of the public could make phone calls and visit websites. Unlike those instances, a drug-detection dog's nose is a sense-enhancing device that provides one-way information from which only the Government benefits. In Smith, this Court reasoned that an individual retains no expectation of privacy in the information he or she conveys to a third party because pen registers or IP addresses, for example, do not reveal the "contents" of communications. 442 U.S. at 741. A dog-sniff search, however, is significantly more invasive because it allows the Government to "see" through the opaque walls of an individual's house to gather private information about the contents of the home. Finally, because a trained drug-detection dog is not in "general public use," the Government's use of such a device at a private residence is substantially more invasive. Therefore, that the

public does not receive a reciprocal benefit from the Government's use of such a device is yet another justification for why a drug-detection dog's "sniff test" is a search.

II. PROBABLE CAUSE IS THE PROPER EVIDENTIARY SHOWING OF WRONGDOING THAT THE GOVERNMENT MUST MAKE UNDER THE FOURTH AMENDMENT PRIOR TO CONDUCTING A DOG-SNIFF SEARCH AT A PRIVATE RESIDENCE.

The Fourth Amendment provides that people have the right "To be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Governmental searches and seizures must be supported by probable cause. Id.

A. Probable Cause Is the Proper and Presumptive Evidentiary Requirement for a Search of a Home.

An individual's place of residence is entitled to enhanced protection. Silverman v. United States, 365 U.S. 505, 511 (1961). This Court in Silverman declared, "At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Id. at 511. In Arizona v. Hicks, this Court determined that probable cause is the presumptive evidentiary standard for a search of an individual's place of residence. 480 U.S. 321, 328 (1986). In Hicks, this Court held that the Fourth Amendment required the police to have probable cause to seize items in plain view. Id. at 329. Police officers entered Hicks' apartment after a shooting. Id. at 323. One police officer observed that expensive stereo equipment looked out of place in an ill-appointed apartment. Id. The officer moved the stereo equipment and recorded the equipment's serial numbers. Id. Later, the officer determined that the stereo equipment was stolen. Id. at 323-24. This Court determined that although the police had a right to enter the apartment because the gunshot had created an emergency, the police did not have probable cause to conduct a separate and unrelated search of the stereo equipment while inside Hicks' place of residence. Hicks, 480 U.S. at 325-

26. Thus, this Court held that when the police conducted a search without probable cause within Hicks' home, the search violated Hicks' Fourth Amendment rights. Hicks, 480 U.S. at 329.

Without a warrant supported by probable cause, the Government cannot use sense-enhancing devices to place itself within an individual's home. Silverman, 365 U.S. at 512. In Silverman, police officers placed a spike mike on the wall of an adjoining house to listen to the conversations and happenings within the defendant's house. Id. at 506. The spike mike was placed a fraction of an inch into the heating system that was connected to the defendant's home. Id. at 511. This Court determined that minimal intrusions, "by even a fraction of an inch" into the home, violate the Fourth Amendment. Id. at 511-12.

A search of the home conducted without probable cause is generally unreasonable. Camara v. Mun. Ct., 387 U.S. 523, 538 (1967). In Camara, the administrative search of a lessee's apartment by municipal health and safety inspectors violated the Fourth Amendment because it was conducted without probable cause. Id. at 534. This Court held that administrative searches were "significant intrusions upon the interests protected by the Fourth Amendment" and these types of suspicionless searches, when not supported by a warrant, lacked "the traditional safeguards which the Fourth Amendment guarantees to the individual." Id.

The dispositive factor in Hicks, Silverman, and Camara, was the fact that the Government's searches were conducted at private homes. Under Hicks, Silverman, and Camara, despite how allegedly minimal the intrusions were, this Court consistently required probable cause for searches of the home. In Hicks, even the slightest movement of stereo equipment at Hicks' home constituted a separate search that required probable cause. 480 U.S. at 329. In Silverman, a mere physical intrusion "by a fraction of an inch" constituted a search requiring probable cause. 365 U.S. at 512. In Camara, this Court noted that, ultimately, it was intrusive

for municipal agents to enter the home without probable cause because the home is a protected area. Camara, 387 U.S. at 538.

In this instance, the Government's search was conducted on the premises of Jardines's private home. Unlike Hicks and Silverman, the dog-sniff search placed the Government inside Jardines's home. A search technique that provides the Government with information that otherwise would be unknowable is significantly more intrusive than merely lifting up stereo equipment or a physical intrusion by a mere "fraction of an inch." Silverman, 365 U.S. at 512. Under Hicks, Silverman, and Camara, the Government must have probable cause prior to conducting a search of a private home. Therefore, the appropriate evidentiary standard that must be applied for the search of Jardines's private home is probable cause.

1. This Court has limited law enforcement's power to conduct searches without reasonable suspicion to a narrow set of exceptions that do not apply to dog-sniff searches of the home.

Without suspicion of wrongdoing, a search or seizure is generally considered unreasonable. Chandler v. Miller, 520 U.S. 305, 308 (1997). There are "only limited circumstances" where suspicionless searches have been allowed. City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000). For example, this Court permitted suspicionless searches of motorists at a Border Patrol checkpoint designed to catch illegal aliens in United States v. Martinez-Fuerte, 428 U.S. 543, 566-67 (1976). In Michigan Department of State Police v. Sitz, this Court permitted checkpoints aimed at catching drunk drivers. 496 U.S. 444, 455 (1990). This Court has also permitted checkpoints when the main purpose was to verify drivers' licenses and vehicle registrations. Delaware v. Prouse, 440 U.S. 648, 663 (1979). However, this Court specifically determined that when the Government's purpose is general crime control, such as

indiscriminate checkpoint roadblocks, such a purpose violates the Fourth Amendment. Edmond, 531 U.S. at 48.

Similar to Edmond, the Government had the impermissible purpose of general crime control here. In Edmond, this Court determined that the City of Indianapolis's suspicionless searches violated the Fourth Amendment. 531 U.S. at 46-47. The City of Indianapolis operated checkpoints on city roads in an effort to find illegal drugs. Id. at 35. Because the city's primary purpose for the roadblocks was general crime control, this Court determined that the checkpoints violated the Fourth Amendment. Id. at 44. This Court was "particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends." Id. at 43.

This Court in Edmond pronounced a very limited set of circumstances where probable cause would not be required for searches. Id. at 37. Dog-sniff searches of the home do not meet the exceptional circumstances this Court articulated in Edmond. This case is not like Prouse, where checkpoints to verify licenses were allowed. Nor is this case like Sitz, where checkpoints aimed at catching drunk drivers were permitted, or like Martinez-Fuerte, where checkpoints were authorized to catch illegal aliens.

Here, the Government's purpose was general crime control. Acting on an unverified and anonymous tip, the Government conducted a suspicionless dog-sniff search of Jardines's home for the impermissible purpose of detecting general criminal activity. Had law enforcement verified the anonymous tip, the Government could have obtained stronger evidence of individualized suspicion. However, because the Government did not verify the tip, the Government's use of the dog-sniff search was an indiscriminate attempt to find illegal drugs without specific evidence of Jardines's criminality. Thus, this search, like other dog-sniff

searches of the home, was in pursuit of nothing more than "general crime control ends." Edmond, 531 U.S. at 43.

2. Probable cause is not an unduly burdensome standard.

Probable cause exists when the facts and circumstances are sufficient in themselves to warrant a reasonable person to believe that an offense has been or is being committed. Carroll v. United States, 267 U.S. 132, 162 (1925). To satisfy probable cause, the information supporting the facts and circumstances of the search must have come from a reasonably trustworthy source. Draper v. United States, 358 U.S. 307, 313 (1959).

Probable cause is not an unduly burdensome standard. To meet probable cause, Carroll requires the facts to be sufficient for a reasonable person to determine that an offense is being or has been committed. 267 U.S. at 162. Draper requires the sources of the facts be trustworthy. 358 U.S. at 313. These are not unreasonable demands when considered in light of this Court's decision in Silverman, where this Court afforded the home significant protection. Because probable cause is not an unduly burdensome standard, this Court should adhere to its precedent and require a showing of probable cause to conduct a search at a private home.

B. A Dog-Sniff Search of the Home Is Not Minimally Intrusive, so a Lesser Evidentiary Standard Should Not Be Applied.

The threshold of the home cannot be crossed without a warrant supported by probable cause. Payton v. New York, 445 U.S. 573, 590 (1980). Dog-sniff searches penetrate the opaque walls of the home and give the Government access to information about the interior of the home that otherwise would be unknowable. This intrusive investigative search violates an individual's reasonable expectation of privacy within his or her home.

1. A sense-enhancing device that allows law enforcement to invasively penetrate the opaque walls of the house is intrusive and, therefore, requires probable cause.

The home is entitled to a higher level of privacy than are public places. Kyllo v. United States, 533 U.S. 27, 40 (2001). In Kyllo, the Government used a thermal imaging device to determine that Kyllo's house was being used to grow marijuana. Id. at 29-30. This Court invalidated the Government's use of the thermal imaging device. Id. at 40. This Court reasoned that the Fourth Amendment "draws a firm line at the entrance to the house." Id. That line "must be not only firm but also bright." Id.

There is a higher expectation of privacy for the interior of the house than public places like automobiles and telephone booths. Id. at 34. This is because when the target of a governmental search is located within the home, the most intimate details of an individual's life can be exposed. Id. at 36. Thus, this Court held in Kyllo, "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area constitutes a search - at least where (as here) the technology in question is not in general public use." Id. at 34.

Here, the Government's use of a dog-sniff search to "see" through the opaque walls of Jardines's home constituted an invasive search. Similar to the thermal imaging device in Kyllo, the dog-sniff search allowed the Government to obtain information about the interior of Jardines's home under circumstances in which human senses could not have obtained such information. Additionally, like the thermal imaging device in Kyllo, drug-detection dogs are not in general public use. Therefore, the Government's use of a sense enhancing device targeted at

contents located within the home crosses the bright line at the entrance to the home that this Court drew in Kyllo.

In United States v. Thomas, the court held that "sniff tests" of houses are searches that must be conducted pursuant to a warrant. 757 F.2d 1359, 1366-67 (2d Cir. 1985). The court recognized "the heightened privacy interest that an individual has in his dwelling place." Id. at 1367. Recognizing that a drug-detection dog "may obtain information about what is inside a dwelling that [officers] could not derive from the use of their own senses," the court determined that the use of a trained dog violated an individual's right to privacy in his or her home. Id. Thus, the court held that the "sniff test" was a search that required probable cause and a warrant. Id.

Similarly, in State v. Rabb, the court held that a drug-detection dog's "sniff test" at the front door of a home violates the Fourth Amendment. 920 So. 2d 1175, 1192 (Fla. Dist. Ct. App. 2006). In Rabb, the defendant was charged with possessing illegal drugs. Id. at 1178. Initially relying on an anonymous source, detectives followed Rabb while he drove his car. Id. When the detectives noticed Rabb making an illegal lane change, the officers pulled Rabb over. Id. During the traffic stop, detectives noticed two marijuana cultivation books and a marijuana cultivation video on the front driver's seat of Rabb's vehicle. Id. The detectives used this information to initiate a dog-sniff search of Rabb's private home. Id. at 1179. The court determined that the dog-sniff search at his front door violated Rabb's Fourth Amendment rights. Id. The court reasoned that the home deserves heightened protection under this Court's standards articulated in Kyllo and re-affirmed Rabb's motion to suppress. Id. at 1192.

In concluding that drug-detection dog "sniff tests" are searches of the home, both the Second Circuit in Thomas and the Florida Court of Appeals in Rabb recognized that the home

deserves heightened protection. Additionally, the Thomas and Rabb courts found that dog-sniff searches of the home are intrusions that violate the Fourth Amendment's protection from unreasonable search and seizure. Like the searches in Thomas and Rabb, the search here was not minimally intrusive because it intruded upon Jardines's expectation of privacy in his home. The search of a home should not be treated like a minimally invasive search, with its concomitant reduced evidentiary standard. To protect the Fourth Amendment rights of the home's inhabitant, a search of the home should require the highest evidentiary standard possible.

Because the interior of the home is entitled to enhanced Fourth Amendment protection, it only follows that the Government must make a showing of probable cause prior to conducting a search that exposes details of a home's interior. Anything less than probable cause would violate the spirit of the Fourth Amendment's protection from unreasonable search and seizure.

2. Because an individual has a reasonable expectation of privacy in his or her home, probable cause is the proper evidentiary standard.

Katz v. United States provided Fourth Amendment protection to all areas where a person has a "reasonable expectation of privacy." 389 U.S. 347, 358 (1967). In Katz, the Government placed an electronic listening and recording device on the exterior of a public telephone booth. Id. at 349. Even though Katz was at a public phone booth, this Court determined that the "Fourth Amendment nonetheless protected Katz from the warrantless eavesdropping because he justifiably relied upon the privacy of the telephone booth." Id. at 353. In shutting the booth's door and paying the toll, Katz was "surely entitled to assume that the words he utter[ed] . . . [would] not be broadcast to the world." Id. at 352. Even in public places, "what [an individual] seeks to preserve as private . . . may be constitutionally protected." Id. at 351.

If Katz was provided the reasonable expectation of privacy at a public phone booth, Jardines should be provided the reasonable expectation of privacy at his private home. If there is

any location where an individual is entitled to the reasonable expectation of privacy, it is in the home. Silverman declared that at the heart of the Fourth Amendment is the right of an individual to be free from governmental intrusion into his home. 365 U.S. at 511. An individual expects a much greater level of privacy at home when compared to the expectation of privacy in a public phone booth, and society is willing to recognize that expectation of privacy as reasonable. Kyllo, 533 U.S. at 34. Therefore, the higher evidentiary standard of probable cause should be required for a search of an individual's private home.

3. A search of a home requires probable cause because a home is unlike a vehicle where an individual's expectation of privacy is greatly reduced.

Minimally invasive searches of vehicles at locations where individuals do not have a reasonable expectation of privacy do not violate the Fourth Amendment because an individual has a reduced expectation of privacy in his or her vehicle. Illinois v. Caballes, 543 U.S. 405, 410 (2005). In Caballes, a warrantless dog-sniff search of a car during a traffic stop was held constitutional. Id. The dog-sniff search was constitutional because it was conducted on the exterior of the defendant's car while the defendant was lawfully stopped for a traffic violation. Id. at 409. The traffic stop occurred on the side of a public highway. Id. at 407. This Court determined that individuals do not have reasonable expectations of privacy on the side of a public highway. Id. at 409. This decision was consistent with Kyllo because the search of the vehicle did not occur at a home. Id. at 409-10. Although individuals have a reasonable expectation of privacy in their homes, they have no such reasonable expectation of privacy in the exterior of their vehicle while stopped on the side of a public highway. Id. at 410.

In Caballes, this Court classified the search of a vehicle as minimally invasive because the dog-sniff search occurred outside the defendant's vehicle and on the side of a public road. Id. at 409. In neither place is an individual entitled to an enhanced expectation of privacy.

Unlike the search in Caballes, the search here was conducted on the premises of Jardines's home. Therefore, this Court's reasoning from Caballes is inapplicable here.

The vehicle exception to the Fourth Amendment gives the Government the ability to search vehicles with a reduced evidentiary showing. United States v. Ross, 456 U.S. 798, 803-04 (1982). The Government is entitled to a lower evidentiary standard because it is impractical for the Government to secure warrants for cases involving inherently movable vehicles that could be transporting contraband goods. Id. at 806-07. Further, overriding societal interests in effective law enforcement justify an immediate search of the vehicle. California v. Carney, 471 U.S. 386, 393 (1985). However, an individual has not subjected him or herself to police regulation simply by moving into a home. As this Court found in Kyllo, the home is entitled to enhanced protection that is not typically afforded to public places. 533 U.S. at 34. For these reasons, vehicles have a reduced expectation of privacy and thus, the Fourth Amendment's vehicle exception does not apply to the home where an individual's expectation of privacy is highest. Carney, 471 U.S. at 393.

4. Dog-sniff searches of luggage at airports are minimally invasive and thus differ greatly from searches of the home.

Dog-sniff searches of luggage at airports are minimally invasive and thus differ greatly from searches of the home. United States v. Place, 462 U.S. 696, 723 (1983). This Court held in Place that dog-sniff searches of luggage at airports do not violate an individual's Fourth Amendment rights because such searches are a less intrusive type of search than other types of searches. Id. at 707. This Court reasoned that dog-sniff searches do not expose items that otherwise would remain hidden from public view nor do they expose non-contraband items. Id. This Court further reasoned that dog-sniff searches were justified because of "the enforcement problems associated with the detection of narcotics trafficking at airports." Id. at 699.

This Court's evidentiary standard from Place should not be applied to the search of Jardines's home because the search in Place occurred at a public place, whereas the search here occurred at a private home. In Place, this Court determined that the dog's sniff of luggage at the airport was not a search because the dog's sniff was not intrusive. 462 U.S. at 707. However, at a public location, such as an airport, an individual has a reduced expectation of privacy.

Unlike airports, the home is a private area entitled to heightened protection. As such, nothing in this Court's reasoning in Place suggests that the analysis of a dog-sniff search in a public area should extend to a dog-sniff search of a home. Any governmental interest here is outweighed by the individual's reasonable expectation of privacy. Therefore, probable cause must be required to protect the individual's heightened expectation of privacy at the home.

C. A Higher Evidentiary Standard Must Be Required Here Because Dog Sniffs Are Unreliable.

The infallible dog "is a creature of legal fiction." Caballes, 543 U.S. at 411 (Souter, J., dissenting). Due to handler errors, limitations of the dogs themselves, and the common problem of currency contaminated with drugs, a dog's positive alert does not necessarily signal hidden contraband. Id. at 411-12. Given the fallibility of the dog, "the sniff is the first step in a process that may disclose intimate details without revealing contraband, just as a thermal-imaging device might do, as described in Kyllo." Id. at 413

One study on the accuracy of drug-detection dogs found that dogs in testing situations returned false positives as much as sixty percent of the time. Id. at 412. In another study, the dog was found to have an accuracy rate of only seventy-one percent. United States v. Kennedy, 131 F.3d 1371, 1378 (10th Cir. 1997). In a third study, a trained narcotics dog erroneously alerted four times out of nineteen while working for the postal service and had false positives eight percent of the time over its entire career. United States v. Scarborough, 128 F.3d 1373,

1378 (10th Cir. 1997). In a fourth study, Postal Inspectors accepted as reliable a dog that had false positives as much as thirty-eight percent of the time. United States v. Limares, 269 F.3d 794, 797 (7th Cir. 2001). In Arkansas, the court referenced a trained drug dog that "had been inaccurate at least ten times and possibly as many as fifty times." Laime v. State, 347 Ark. 142, 159 (2001). Perhaps as much as eighty percent of currency in circulation has drug residue on it, and a drug-detection dog might erroneously alert to eighty percent of the circulated currency placed in front of it. United States v. $242,484.00, 351 F.3d 499, 511 (11th Cir. 2003).

The Houston Police Department does not allow searches based solely on dog alerts. Mark E. Smith, Going to the Dogs: Evaluating the Proper Standard for Narcotic Detector Dog Searches of Private Residences, 46 Hous. L. Rev. 103, 136 (2009) (citing R.C. Smith, Former Head Narcotic Detector Dog Trainer, Houston Police Department. R.C. has been a dog trainer for over twenty-eight years and trained over one hundred detector dogs). Concerned about the potential inaccuracy of dogs, the Houston Police Department has outlined a policy that a dog's alert, alone, cannot establish the presence of narcotics. Id.

Because a lengthy body of research questions the accuracy of drug-detection dog "sniff tests," a higher evidentiary showing must be required to conduct a dog-sniff search at a private home. Allowing a dog-sniff search based on even mere reasonable suspicion would increase the possibility for future unreasonable searches and seizures. If a drug-detection dog provides a false positive, an innocent individual will be subjected to an intrusive and unwarranted home search. On the other hand, if the Government does discover something, it will be justified in conducting the search. This Court should not look to the result of a search to determine if a search has occurred; "A search in violation of the Constitution is not made lawful by what it brings to light." United States v. Jacobsen, 466 U.S. 109, 140 (1984). Furthermore, such an

ends-justify-the-means approach to the Fourth Amendment is surely not what the Framers intended. Therefore, because dog-sniff searches are unreliable, law enforcement should have probable cause prior to conducting such an intrusive procedure.

D. Requiring an Evidentiary Standard Less than Probable Cause for a Dog-Sniff Search of the Home Would Erode the Fourth Amendment's Protection from Unreasonable Search and Seizure.

In Kyllo, Justice Scalia wrote, "the Fourth Amendment draws a firm line at the entrance to the house." 533 U.S. at 40. In bolstering his point, Justice Scalia determined, "That line . . . must be not only firm but also bright." Id. Here, this Court faces a governmental search technique that threatens to violate the "firm line" at the entrance to the house. Id.

The home is the one remaining bastion where one has a "reasonable expectation of privacy." Katz, 533 U.S. at 34. It is the most sacred of all locations. To protect the sanctity of the home, probable cause must be the minimum standard required before dog-sniff searches at the front door are permitted. Allowing dog-sniff searches to penetrate the sacred entrance to the home without a prior showing of probable cause violates the Framers' intent in enacting the Fourth Amendment and poses a grave threat to civil liberties.

The vigilant defense of the home from sense-enhancing devices began with Kyllo and must be continued here. Innovations in sense-enhancing devices will continue to provide the Government with newer and better ways to penetrate the home. In Kyllo, this Court was fearful of "more sophisticated systems that are already in use or in development." 533 U.S. at 36. A dog's nose is a sense-enhancing device that when used upon a home embodies this Court's fears in Kyllo. As a result, the "firm line" at the entrance to the house must be vigilantly defended here.

CONCLUSION

The use of sense-enhancing devices to obtain information about the interior of the home that otherwise would remain unknowable constitutes a search. Because a dog-sniff search at the front door of a private residence is the functional equivalent of physical presence inside the home, it is an intrusive investigative technique. This is particularly true when the Government is conducting the search where it has no lawful right to be. Thus, a drug-detection dog's "sniff test" constitutes a search.

Probable cause is the proper evidentiary showing of wrongdoing that the Government must make prior to conducting a dog-sniff search because it is the presumptive evidentiary requirement for a search of the home. The home is entitled to a higher level of privacy than are public places. To require any standard less than probable cause would violate one's reasonable expectation of privacy in the home and the spirit of the Fourth Amendment. Therefore, Respondent respectfully requests that this Court uphold the decision of the Florida Supreme Court.

Dated: October 15, 2012

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